Supreme Court, U. S.
FILED
NOV 30 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 79-243

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, AND KEVIN MCCARTHY,
Appellants,

v.

COMMONWEALTH OF VIRGINIA
Appellee.

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, AND KEVIN MCCARTHY,
Appellants,

v.

RICHARD H.C. TAYLOR,
Appellee.

On Appeal From The Supreme Court of The Commonwealth of Virginia

BRIEF AMICI CURIAE OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AND AMERICAN SOCIETY OF NEWSPAPER EDITORS IN SUPPORT OF APPELLANTS

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BRIEF AMICI CURIAE OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AND AMERICAN SOCIETY OF NEWSPAPER EDITORS IN SUPPORT OF APPELLANTS

PRELIMINARY STATEMENT

The American Newspaper Publishers Association (hereinafter "ANPA") and the American Society of Newspaper Editors (hereinafter "ASNE") submit this

brief *amici curiae* in support of Appellants Richmond Newspapers, Inc., et al. All parties to this suit have given ANPA and ASNE written consent to the filing of this brief. Copies of such consents have been filed with the Clerk of this Court.

INTEREST OF THE AMICI

ANPA is a non-profit membership corporation organized under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,360 newspapers constituting over 90 percent of the total daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation, in the United States. Richmond Newspapers, Inc. and twenty-six other newspapers in the Commonwealth of Virginia are members of ANPA.

ASNE is a nationwide, professional organization of more than 800 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over fifty years ago, include the maintenance of the "the dignity and rights of the profession" (ASNE Constitution, Preamble) and the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

Both ANPA and ASNE are committed to the proposition that, pursuant to the First Amendment, the press has an obligation to provide the citizenry of this country with complete and accurate reports of the affairs of government—be they executive, legislative, or judicial. For "in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 491 (1975). This Court has consistently recognized the important role played by a free press in providing such information to the public and has acknowledged both the right of the press to report on and the public's right to be informed of incidents of judicial proceedings. See, *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978); *Oklahoma Pub. Co. v. District Court of Oklahoma County*, 430 U.S. 308 (1977); *Nebraska Press Association v. Stuart*, 427 U.S. 536 (1976).

This Court's decision last term in *Gannett* v. *DePasquale*, ____U.S.____, 61 L.Ed.2d 608 (1979), while ostensibly based on the Sixth Amendment, seemed to negate, or at least draw into question, much of the learning espoused in the Court's prior rulings. As the result of an apparent misconception of the *Gannett* decision, the Supreme Court of Virginia has sanctioned the closing of an entire criminal trial.

In light of the constitutionally prescribed role of our free press in presenting for public debate matters of official concern, and the fact that "[t]he operations of the courts and the conduct of judges are matters of utmost public concern," *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), your amici are alarmed that a senior state court has determined that this Court's holding in *DePasquale*, *supra*, has led to a conclusion that criminal trials can be held in secret. Your amici strongly dispute the Supreme Court of Virginia's resolution of the constitutional values involved. The Supreme Court of Virginia's reliance on *DePasquale* for the proposition that entire criminal proceedings may be closed to the public is clearly erroneous and, should it be permitted to stand, would lead federal and state trial courts to routinely disregard their judicial responsibility to safeguard the constitutional rights of the citizenry under the First, Sixth, Ninth and Fourteenth Amendments.

STATEMENT OF THE CASE AND CONSTITUTIONAL PROVISIONS INVOLVED

Your amici adopt the statement of the case as set forth in the Brief for Appellants filed by Richmond Newspapers, Inc.[1] Your amici submit, however, that in addition to the constitutional provisions of the First, Sixth and Fourteenth Amendments, cited by Appellants therein, this case involves the Ninth Amendment, which provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

SUMMARY OF ARGUMENT

We would urge upon the Court that in light of the fact that as of October 8, 1979 there had been more than fifty closures of judicial proceedings in the form of pretrials, trials or sentencings, the Court should summarily reverse the Supreme Court of Virginia's reliance on *Gannett v. DePasquale, supra*. This would be in keeping with the views of the minority in that case and in keeping with the views of Justice Stevens, joined by Justices Brennan and Powell in dissent in *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), where Justice Stevens said: "By express command of the Sixth Amendment the proceeding must be a 'public trial.' It is important not only that the trial itself be fair,

[1] Being aware of this Court's stated reservations as to its jurisdiction in this case, your amici urge, that should the Court determine that it lacks jurisdiction through appeal under 28 U.S.C. § 1257(2), the Court should treat "the papers whereon the appeal was taken as a petition for writ of certiorari" and grant the petition. *See*, Pennsylvania v. Board of Directors, 353 U.S. 230, *reh. denied*, 353 U.S. 989 (1957).

but also that the community at large have confidence in the integrity of the proceeding." *Id.* at 36-37.

Not only should this Court summarily reverse the Supreme Court of Virginia but we most respectfully urge the Court to review its holding in *DePasquale, supra*. We would hope to persuade the Court that in our Republic no judicial proceeding should ever be closed to the public and concurrently to the press except in the rarest of cases and then under standards spelled out by this Court.

While in *DePasquale* this Court found no occasion to address or delineate the First Amendment interests affected by the closing of judicial proceedings, your amici submit that such interests are necessarily implicated whenever a decision is made to hold part or all of a judicial proceeding in secret. Although neither the literal language of the First Amendment nor of the Sixth Amendment explicitly provides a right of the public to attend criminal judicial proceedings, such a right flows from an analysis of the goals which those amendments were intended to achieve. Absent recognition of such a right, the specific rights guaranteed will be less secure.

Further, your amici contend that, even if the First and Sixth Amendments do not provide a right of the public and the press to attend judicial proceedings, this right has been reserved to the people under the Ninth Amendment. The latter was included in the Bill of Rights to guard against advancement of the theory that the enumeration of certain rights implied the disparagement or nonexistence of other fundamental rights. Historical analysis, such as that engaged in by Justice Blackmun in *DePasquale*, demonstrates that there was an unbroken tradition of open judicial proceedings both in England and colonial America. The Framers of the Constitution and the Bill of Rights never intended to put an end to that tradition; rather, they understood it to be the established course of common law which would be carried forward

under the Constitution. See, III STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 662 (1833).

Finally, your amici contend that in those rare instances where a part of a judicial proceeding is to be closed to the public and press, such a closing may only be allowed after a strong showing of a clear and present danger to the fair administration of justice, and a strong indication that alternative measures will be ineffective in preserving the fairness of the proceeding.

Any analysis of the right of the public and press to attend judicial proceedings, whether under the First, Sixth and/or Ninth Amendments, requires an exploration of the historical background which led to adoption of those amendments. Such an exploration demonstrates that the right to open judicial proceedings has long been viewed to be of utmost importance.

Mankind has sought since earliest recorded times to cast the light of publicity on the functioning of its governmental bodies irrespective of whether it related to a legislative, executive or judicial branch of government, in whatever form. The first reference to this social phenomenon found by your amici, dating back to the fifteenth century B.C., is:

> Lo, whenever an administrator hears cases let there be publicity and let water and air report all that he may do. Lo, then his conduct is by no means unperceived. If he does anything (unseemly) and he is to blame he is not to be reinstalled on the authority of an acting official but men shall learn of it on the authority of his (proper) judge...[2]

[2] From the tomb of Rekhmire, Vizer to Tuthmosis III, King of Egypt, XVIII dynasty (1580-1321 B.C.).

Turning to our own legal heritage, the following from H. CROSS, THE PEOPLE'S RIGHT TO KNOW, (1953) accurately reflects our Common Law history:

> *I have something to say to the court about the first fundamental liberty of an Englishman in order to his trial; which is that by the laws of this land all courts of justice ought to be free and open for all sorts of peaceable people to see, behold, and hear, and have free access unto...and yet, Sir, as I came in, I found the gates shut and guarded, which is contrary to law and justice.*
>
> Thus, in 1649, charged with high treason, spoke John Lilburne. Such was the law of England, and his request was granted. While he was the first to "make the news" in a reported case, the practice of having trials open to the public was already of long standing in the common law.
>
> Both Hale and Blackstone state that evidence is presented in open court in the presence of all bystanders. Bishop, in his work on the criminal law, asserts that "from immemorial usage wherever the common law prevails, all trials are in open court to which spectators are admitted." The origin of the practice is more obscure than evidence of its ancient existence. Yet origin may have some bearing on the question whether the right belongs to the accused alone (in which event he might waive it and thus, with the prosecution's acquiescence, close the trial) or whether it may be claimed in behalf of the public by a representative thereof.
>
> The United States Supreme Court has said that the traditional Anglo-Saxon distrust of secret trials has been variously ascribed to the notorious use thereof by the Spanish Inquisition,

to the excesses of the English Court of Star Chamber, and to the French Monarchy's abuse of the *lettre de cachet*. Inquisition, Star Chamber, and *lettre de cachet* symbolized a menace to liberty; each had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of the accused to a fair trial.

* * *

But whatever its origin the common law concept of a public trial had come to be regarded (at the time of the adoption of the Sixth Amendment) as an essential guarantee against attempts to employ the courts as instruments of persecution. The knowledge that every criminal trial was subject to contemporaneous review in the forum of public opinion was regarded as an effective restraint on possible abuse of judicial power. It was also thought that if trials were public important witnesses unknown to the parties might thus be informed of developments and voluntarily come forward to testify, and spectators might learn enough about the administration of the law to acquire confidence in seeking judicial remedies for their own real or fancied wrongs.[3]

It was against this background that the Bill of Rights evolved. The Commonwealth of Virginia adopted protection of the right of free speech and press well before the adoption of same in the Constitution of the United States. This protection sounded in the struggle during Colonial times which eventuated in the Revolutionary War and brought about a realization on the part of revolutionary

[3] H. CROSS, THE PEOPLE'S RIGHT TO KNOW, 155-56 (1953).

statesmen such as Jefferson, Madison, Bushrod Washington, Adams, Hancock, Mason and others, that contrary to the unwritten Constitution of the Mother Country, in order to ensure the rights of the people of the aborning country, some basic philosophies would have to be placed in specific language in a written constitution for all under a republican form of democracy. In reaching these conclusions, it is clear from the early writings that one right upon which there existed no doubt was that, in the tradition of England, open trials went back to the Middle Ages. At one time they were the primary social event of villages and towns in England, Scotland, Wales and Ireland. It is clear that there was never any doubt in the minds of our constitutional forebearers that the right of open trial was a right so clearly preserved to the people that it need not be spelled out in the Constitution; as will be shown later, it was one of those immemorial basic rights which are guaranteed under the Ninth Amendment.

The states refused to adopt the Constitution unless a Bill of Rights was adopted. When the Senate of the United States sent twelve proposed amendments to the people for ratification, Article the Eleventh read, "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." The House of Representatives sent to the Senate an Article XIV: "no state shall infringe the right of trial by jury in criminal cases, nor the right of conscience, nor freedom of speech, or of the press." When these proposals were sent from the Senate to the states, freedom of religion, speech and press, the right of the people to peaceably assemble and to petition the government for a redress of grievances were placed in Article the Third and the right of an accused to enjoy a speedy and public trial was placed under Article the Eighth. Since the people

refused to ratify Article the First and Article the Second, Article the Third became the First Amendment and Article the Eighth became the Sixth Amendment.[4]

This Court has frequently held that the First Amendment not only guarantees the freedom to speak and to publish but also the freedom of the public to receive informational ideas. See *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U.S. 748 (1976); *Stanley* v. *Georgia*, 394 U.S. 557 (1969); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *New York Times* v. *Sullivan*, 376 U.S. 254 (1964). In so doing the Court has recognized that the First Amendment was intended to ensure both free and *informed* discussion of governmental affairs. Especially in connection with the judicial branch of government, the Court has recognized that "[t]he operations of the courts and the judicial conduct of judges are matters of utmost public concern." *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978). *See Nebraska Press Association* v. *Stuart* 427 U.S. 539 (1976); *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966). Open judicial proceedings promote the goals of the First and Sixth Amendments by subjecting the judicial process to public scrutiny and by assuring judicial accountability and fairness for criminal defendants as a result of such scrutiny. While neither amendment explicitly provides that judicial proceedings shall be open, the guarantees sought to be provided therein cannot be achieved in the absence of recognition that a right of attendance at judicial proceedings is encompassed in those amendments.

In *DePasquale*, only Justice Powell considered the First Amendment interests at stake. Your amici believe that a proper consideration of the interplay of the First and Sixth Amendments, when considering the closing of

[4] Appendix "A" to Report of American Newspaper Publishers Association on Free Press and Fair Trial.

judicial proceedings, leads to the conclusion that such proceedings may be closed only in the rarest of circumstances. Should the Court be unable so to conclude, however, we submit that open judicial proceedings are a guarantee to the people encompassed within the Ninth Amendment and the emanations of the First and Sixth Amendments. When it was determined that a Bill of Rights was required, the Ninth Amendment was inserted specifically to ensure that those fundamental rights not enumerated in the first eight amendments would not be lost. Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627 (1956). The historical background recited by Justice Blackmun, dissenting in *DePasquale*, fully supports the proposition that open judicial proceedings were a tradition of such long standing at common law, that the Framers could not have intended to sacrifice such a fundamental right by failing explicitly to enumerate it in the first eight amendments. In *DePasquale*, this Court seemed to suggest that the "public trial" guarantee of the Sixth Amendment is not a guarantee to the public but one which belongs to the criminal defendant, and possibly the prosecutor and the trial judge. Your amici suggest that analysis of the First and Ninth Amendments, as well as the Sixth Amendment, and the penumbras surrounding them requires recognition of the immemorial tradition of open judicial proceedings.

Whether the right to open judicial proceedings lies in the First, Sixth and/or Ninth Amendments, it has been suggested that the right may be overridden. *Gannett* v. *DePasquale*, *supra* at 629; *Id.* at 632 (Powell, J. concurring). In light of *Nebraska Press Association* v. *Stuart*, *supra*, your amici are aware that there may be rare instances in which a criminal defendant's Sixth Amendment rights may take precedence over other constitutional rights. *Id.* at 551. Recognizing the distinction between cases involving prior restraints on publication,

and those involving the public's right to attend criminal proceedings, your amici submit that the latter right is a fundamental one of constitutional stature requiring the same degree of judicial protection set forth in *Nebraska Press*. Nothing less than a strong showing of clear and present danger to the fairness of the proceeding must be required prior to closing a criminal trial.

Your amici urge this Court to clarify the confusion which has ensued from the recent *DePasquale* decision. Whether it be based in the First, Sixth or Ninth Amendments or in the emanations stemming from the guarantees contained therein, the right of both the public and the press to attend criminal proceedings is of vital importance to our form of democracy and is mandated by the Constitution.

ARGUMENT

In the instant case, the Supreme Court of Virginia summarily dismissed appellants' petitions for writ of mandamus and writ of prohibition and refused appellants' petition for appeal, without opinion, merely citing this Court's recent decision in *Gannett Co., Inc. v. DePasquale*, *supra*. In so doing the Supreme Court of Virginia sanctioned the closing of entire criminal trials. Yet, despite the confusion which has been caused by the majority opinion in *DePasquale*, it is clear that at least seven members of this Court are of the opinion that criminal trials *must* be public in the absence of extraordinary circumstances mandating the imposition of reasonable restrictions to safeguard the rights of the defendant and the public alike.

Justices Blackmun, Brennan, White and Marshall, dissenting in *DePasquale*, stated that no part of any criminal proceedings should be closed "unless a defendant carries his burden to demonstrate a strict and inescapable

necessity for closure." *Id.* at 661. Chief Justice Burger filed a separate concurring opinion in *DePasquale* to emphasize his view that the majority opinion was applicable only to pretrial proceedings. Finally, although Justices Stevens and Powell joined the majority opinion in *DePasquale*, both had unequivocally stated that the Sixth Amendment prohibits closed trials, as recently as the last term. Justice Stevens, joined in dissent by Justices Brennan and Powell in *Houchins v. KQED, Inc.*, *supra*, wrote:

> [A] trial. . .must conform to the dictates of the Constitution. By express command of the Sixth Amendment the proceeding must be a "public trial." It is important not only that the trial itself be fair, but also that the community at large have confidence in the integrity of the proceeding.

Id. at 36-37 (footnotes omitted).

Given the stated positions of these seven members of the Court, it is inconceivable that they would permit to stand the closing of an entire criminal proceeding on the sole basis of the defendant's complaint that: "I don't want any information being shuffled back and forth when we have a recess as to what—who testified to what." Jurisdictional Statement, App.D at 7a. If, indeed, a criminal trial ever may be closed in its entirety to the public, such a basis for closure falls far short of meeting the *Standards Relating to Fair Trial and Free Press* approved by the American Bar Association House of Delegates[5] and fails entirely to comport with the guarantees of the First, Sixth, Ninth and Fourteenth Amendments.

Nevertheless, the very fact that the Supreme Court of Virginia has sanctioned a closing on such grounds demonstrates the confusion which has arisen as a result of this

[5] See Appendix A

Court's decision in *DePasquale*. As has been noted previously, the massive misinterpretations emanating from the *DePasquale* decision have resulted in more than 50 closings of judicial proceedings (pretrial, trial and post-trial). Your amici respectfully urge this Court not only to summarily reverse the decision of the Supreme Court of Virginia, but also to grasp this early opportunity to review the decision rendered in *Gannett v. DePasquale, supra*. The following arguments are submitted in an effort to aid the Court in considering the constitutional guarantees which must be examined and balanced where the rights of defendants and the public to open judicial proceedings come into conflict.

I

A RIGHT OF THE PUBLIC AND THE PRESS TO ATTEND JUDICIAL PROCEEDINGS LIES IN THE FIRST, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

An essential protection against arbitrary and oppressive exercise of the powers delegated to our federal and state governments lies in the First Amendment freedoms of speech and press. The freedom of speech permits the unfettered communication of political grievances. In addition, it forecloses governmental control or manipulation of the sentiments uttered by and to the public and, by protecting our right to full information concerning the doings or misdoings of governmental officials and institutions, whether they be judicial, legislative or executive, it guards against the maladministration of government. Thus, the right of the public to speak and the press to publish is unfulfilled without a correlative public right to receive information. See generally, Emerson, *Legal*

Foundations of the Right to Know, 1976 WASH. U.L.Q., 6-7 (1976); Note, *The Constitutional Right to Know*, 4 HASTINGS CONST. L.Q. 109 (1977). This Court has recognized this right on several occasions. In *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), this Court struck down a city ordinance prohibiting the posting of real estate "For Sale" or "Sold" signs, based on both the speaker's right to communicate and the listener's "First Amendment interest in the subject matter of the speech." *Id.* at 92. *See also Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748 (1976). The case of *Procunier v. Martinez*, 416 U.S. 396 (1974) recognized a right to receive personal correspondence. This Court further has held that both "a labor organizer's right to speak and the right of workers 'to hear what he had to say,'...were abridged by a state law requiring organizers to register before soliciting union membership." *Kleindienst v. Mandel*, 408 U.S. 753 at 763 (1972), citing *Thomas v. Collins*, 323 U.S. 516 (1945).

In *Stanley v. Georgia*, 394 U.S. 557 (1969), this Court noted that "[It] is now well established that the Constitution protects the right to receive informational ideas. . . This right to receive informational ideas . . . is fundamental to our free society." *Id.* at 564. And in *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965), the Court referred to a right to receive information as falling within the penumbra of the First Amendment freedoms of speech and press.

Your amici submit that the First Amendment was intended to protect both free and *informed* discussion of governmental affairs and that the flow to the public of

information on the conduct of judicial proceedings necessarily is encompassed within the protections of the First Amendment.[6]

Over thirty years ago, this Court held: "A trial is a public event. What transpires in the courtroom is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947). This principle is more than simply an observation that criminal defendants generally elect to exercise their Sixth Amendment right to public trial; rather, it reflects the belief that "[t]he operations of the courts and the judicial conduct of judges are matters of utmost public concern," *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), which therefore must be open to public scrutiny and comment. Your amici respectfully submit that cases such as *Craig v. Harney, supra, Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539 (1976), and *Oklahoma Publishing Company v. District Court of Oklahoma County*, 430 U.S. 308 (1977) cannot be construed to rest solely on the narrow ground that the First Amendment prohibits prior restraints on publication. They reflect the common understanding that open judicial proceedings protect the public's right to know and preserve "the respect and confidence of the community in applications of the criminal law." *In re Winship*, 397 U.S. 358, 364 (1970). Thus, open criminal proceedings, which make possible contemporaneous public scrutiny and comment on our judicial system, "are of critical importance to our type of government in which

[6] Information gathering is clearly entitled to variable degrees of constitutional protection. See, e.g., Branzburg v. Hayes, 408 U.S. 665, 681 (1972); Pell v. Procunier, 417 U.S. 817, 833 (1974). This protection necessarily complements that protection accorded the public under the First Amendment to receive information and ideas. See, e.g., Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 756 (1976); Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266-270 (1964); Stanley v. Georgia, 394 U.S. 557 (1969).

the citizenry is the final judge of the proper conduct of public business." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975).

At the same time, public attendance at criminal trials, and the publicity and debate it generates, promotes that fair treatment which the Sixth Amendment public trial guarantee is designed to provide. "[J]ustice cannot survive behind walls of silence," and "[a] responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. The press . . . guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Sheppard v. Maxwell*, 384 U.S. 333, 349, 350 (1966); see also, *Cox Broadcasting Corp. v. Cohn, supra* at 492 (1975). In holding, *inter alia*, that secret proceedings were violative of the Fourteenth Amendment, this Court quoted Jeremy Bentham as follows:

> . . . suppose the proceedings to be completely secret, and the court, on the occasion, to consist of no more than a single judge,—that judge will be at once indolent and arbitrary: how corrupt soever his inclination may be, it will find no check, at any rate no tolerably efficient check, to oppose it. Without publicity, all of the checks are insufficient: in comparison of publicity, all other checks are of small account.

In Re Oliver, 333 U.S. 257, 271 (1948).

One contemporary commentator has argued that:

> recognizing a[n] [independent] right of attendance [at criminal judicial proceedings] would actually promote the protective policies of the Sixth Amendment. Individual defendants are given the right of public trial on the theory

> that their enforcement of the right will preserve the norm of openness and thus achieve the goal of fairness. Ultimately, the goal is fairness for *all* defendants, and its attainment depends upon public awareness, discussion, and criticism of the criminal process. Public scrutiny of criminal prosecutions, and especially of pretrial proceedings, preserves and enhances the quality of criminal justice.

Note, *The Right to Attend Criminal Hearings*, 78 COLUM. L. REV. 1308, 1325. (1978) (Footnotes omitted)

Thus, although neither the First Amendment nor the Sixth Amendment alone *explicitly* provides an independent right of the public to attend criminal judicial proceedings, a constitutional basis for a penumbral right of attendance arises nonetheless from the interplay of these two constitutional texts. Attendance at criminal judicial proceedings promotes the protective policy of the First and Sixth Amendments by subjecting the judicial process to public scrutiny which both informs the people of the operations of their judiciary and, over the long term, secures judicial accountability and fairness for criminal defendants. Therefore, to assure implementation of these dual, fundamental constitutional goals, this Court should recognize a qualified constitutional right on the part of both the public and its representative, the news media, to attend criminal proceedings, and speak and publish on the events that transpire at such hearings.

This Court on previous occasions has upheld claims of constitutional rights which are not explicitly encompassed within the text of a single constitutional provision. In *Griswold v. Connecticut*, 381 U.S. 479 (1965) (plurality opinion), the Court struck down a state statute which penalized the use by married couples of "any drug, medicinal article, or instrument for the purpose of preventing

conception." The Court held that such a statute violated a constitutional right of privacy which is not found in the express terms of a constitutional amendment, but which emanates from the First, Third, Fourth, Fifth and Ninth Amendments, each of which has "a penumbra where privacy is protected from governmental intrusion." *Id.* at 483. Justice Douglas, writing for the Court in *Griswold*, also discussed the penumbra surrounding the explicit terms of the First Amendment:

> The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parent's choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or foreign language. Yet the First Amendment has been construed to include certain of those rights.
>
> * * * *
>
> The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach—indeed the freedom of the entire university community. *Without those peripheral rights, the specific rights would be less secure.* (citations omitted) (emphasis added).

Id. at 482

Thus, in assessing the existence or nonexistence of a constitutional right, this Court is not limited to strict statutory construction of the explicit guarantees found in one or more constitutional amendments. It may focus "on the nature of the activity at issue and the extent to which the allowance—or encouragement—of that activity is

necessary to achieve the goals of separate texts. Note, *The Right to Attend Criminal Hearings*, 78 COLUM. L. REV. 1308, 1327 (1978).

Griswold cites two other cases where this functional analytical approach was taken in recognizing a non-explicit constitutional right. In *NAACP v. Alabama*, 357 U.S. 449 (1958) this Court looked at the activity involved—the anonymous association with others for the purpose of promoting a political cause—and found that it was not expressly protected under the terms of either the free speech clause or the free assembly clause of the First Amendment. Nonetheless, the Court found that such activity promoted the fundamental purposes of each clause, while denial of constitutional protection over such activity would undermine those purposes. As a result, the Court found "in the close nexus between the freedoms of speech and assembly," a constitutional right of association.

In *Boyd v. United States*, 116 U.S. 616 (1886), a constitutional challenge was raised to a state statute which authorized the compulsory production by citizens of their personal records for use as physical evidence against their owner. The Court found that the statute was not invalidated under a literal interpretation of the Fourth Amendment prohibition on "unreasonable searches and seizures" or the Fifth Amendment prohibition on compelling a person "to be a witness against himself." The Court found that in protecting individual privacy and security, the Fourth and Fifth Amendments "run almost into one another." After an analysis of the historical underpinnings of the Fourth and Fifth Amendments, the Court determined that "a close and literal construction [would] deprive them of half their efficacy and lead to gradual depreciation of the right[s]" guaranteed thereunder. The Court, therefore, held the statute unconstitutional as violating the meaning and thrust of the

Fourth and Fifth Amendments, despite the particular wordings of those Amendments.[7]

Thus, where two disparate constitutional provisions may reinforce one another to a significant degree, they may be considered, in combination, to sustain a constitutional right which effectuates their policies but which cannot be found in the express language of either provision. There being no dispute that public criminal proceedings promote fair treatment before the courts of this country, through judicial accountability and "public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect," *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978), a defendant's election to close presumptively open judicial proceedings may be subjected to constitutional limitation and, as Justice Powell has stated in *Gannett v. DePasquale*, ___U.S.___, 61 L.Ed.2d 608, 632 (1979), closure must not be permitted unless the public's First and Sixth Amendments rights to attend are balanced against a compelling state interest in closure.

II

THE IMMEMORIAL TRADITION OF OPEN JUDICIAL PROCEEDINGS IS A FUNDAMENTAL RIGHT RETAINED BY THE PEOPLE UNDER THE NINTH AMENDMENT

To a considerable degree, the controversy in this case has centered on the question of whether the First or Sixth

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[7] The need for an analysis which goes beyond the express terms of the Bill of Rights and confers protection on those personal rights necessary to give meaningful effect to the express guarantees was adverted to by Justice Brennan in Lamont v. Postmaster General, 381 U.S. 301 (1965):

> "[T]he protection of the Bill of Rights goes beyond the specific guarantees to protect from abridgement those equally fundamental personal rights necessary to make the express guarantee fully meaningful." *Id.* at 308 (Brennan, J., concurring).

Amendments, or both of them, guarantee to the public the right to attend trials. That is, to be sure, the first question to be addressed by the Court since an affirmative answer would—as we have urged—require reversal in this case. But it is not the only question.

If, for any reason, the Court should conclude that neither the First nor the Sixth Amendment, of their own force, protects the right of open judicial proceedings, the Court could and, we believe, should nonetheless rule that the Ninth Amendment protects that right.

The Ninth Amendment was added to the Constitution to preclude any risk that courts would apply the maxim *expressio unius est exclusio alterius* to the Bill of Rights. Many state conventions had opposed ratification of the original Constitution unless a bill of rights was included, but concern was expressed that inclusion of such a document would do more harm than good. One opponent, for example, argued:

> There is a maxim in law, and it will apply to bills of rights, that when you enumerate exceptions, the exceptions operate to the exclusion of all circumstances that are omitted; consequently, unless you except every right from the grant of power, those omitted are inferred to be resigned to the discretion of the Government.

1 ANNALS OF CONGRESS 747 (Gales & Seaton ed. 1834) (Rep. Jackson of Georgia). *See* G. WOOD, THE CREATION OF AMERICAN REPUBLIC 537-40 (1969).

Alexander Hamilton, as well, had objected to the adoption of a Bill of Rights on the ground, *inter alia*, that to enumerate such rights might permit the disparagement of others. *See* The Federalist No. 84 (A. Hamilton), at 559 (Modern Library ed.)

Answering such objections on the floor of the House of Representatives, James Madison stated:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments that I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution.

1 ANNALS OF CONGRESS, *supra*, at 439.

The result was the Ninth Amendment.[8] Drafted by Madison, it was adopted simply to insure "that by enumeration of rights in the Constitution *nothing has been lost;* that the rights of the people would have rested on as firm ground without enumeration, because they do not lie within the purview of powers granted to Congress". Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627, 643 (emphasis in original) (1956).[9]

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[8] It provides:

> "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

[9] *Accord, e.g.*, 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 626-27, 651 (6th ed. 1891); Redlich, *Are There "Certain Rights . . . Retained by the People?"*, 37 N.Y.U. L. REV. 787, 805 (1962); Note, *The Ninth Amendment: Guidepost to Fundamental Rights*, 8 WM. & MARY L. REV. 101, 102-07 (1966).

The right to attend criminal proceedings, we submit, is a right "retained by the people" within the meaning of the Ninth Amendment. It was common ground for the majority and the dissenters in *Gannett* that the right of the people to attend judicial proceedings is deeply rooted in our common law traditions. *See* 61 L. Ed. 2d 624-26 & nn.15 & 18; *id.* at 646-55 (Blackmun, J., joined by Brennan, White & Marshall, JJ., dissenting). *Cf. id.* at 630 (Burger, C.J., concurring) ("It is the practice of Western societies, and has been part of the common law tradition for centuries, that trials generally be public."); *id.* at 632 (Powell, J., concurring) (by implication) (recognizing First Amendment right based on "the importance of the public's having accurate information concerning the operation of its criminal justice system"). *Accord, In re Oliver*, 333 U.S. 257, 266 (1948).

From ancient times in England, through the periods of Anglo-Saxon rule, Norman conquest and the rebellion of the Royal colonies in America, there was an unbroken tradition of open judicial proceedings in criminal cases. Trials were conducted "openlie in the presence of Judges, the Justices, the enquest, the prisoner, and so manie as well or can come so neare as to heare it, . . . that all men may heare from the mouth of the depositors and witnesses what is saide." *Gannett, supra*, 61 L. Ed.2d at 647 (Blackmun, J., dissenting) (quoting T. Smith, De Republica Anglorum (Alston ed. 1972)).

Although the *Gannett* majority cites several twentieth century commentators who regard enactment of the Sixth Amendment right of public trial as reflecting the evolution of a personal right, or at least primarily a personal right, of the accused, 61 L. Ed.2d at 622, n.9, the English judicial system began requiring public trials at a time when that system had very little regard for the rights of

the accused. See 31 N.Y.U. L. REV. 611 (1956); 6 J. WIGMORE, EVIDENCE § 1834 (J. Chadbourne rev. ed. 1976) and authorities cited therein. Criminal proceedings were uniformly held in public long before criminal defendants were first accorded such protections as the right to counsel, jury trial, prior notice of the charges, and the right to confrontation—protections subsequently incorporated into the United States Constitution and proposed by the First Congress to the legislatures of the several states for ratification in 1789. The public right to attend a trial therefore arose entirely independently of the subsequent recognition that public proceedings may also serve to protect criminal defendants from judicial overreaching.

It is a fundamental tenet of the common law, both in England and in America, that trials are to be public occurrences. This right of the people to access to judicial proceedings is founded on the belief that courts are public instrumentalities and that their activities are a proper matter for public scrutiny. Lord Coke, commenting upon the words "*In curia domini regis*" as they are used in the Statute of Marlebridge, 1267, 52 Hen. 3, c.1, said:

> These words are of great importance, for all causes ought to be heard, ordered, and determined before the Judges of the Kings Courts openly in the Kings Courts, whither all persons may resort; and in no chambers or other private places.

2 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND, 103-04 (6th Ed. 1681).

This heritage of the common law has been evident in American jurisprudence from the earliest days of the colonies. Its first appearance in a public document may have been the Charter of the Fundamental Laws of New Jersey, drafted in 1676, whose Chapter XXIII provided:

> That in all publick courts of justice for tryals of causes, civil or criminal any person or persons,

> inhabitants of the said Province, may freely come into, and attend said courts, and hear and be present, at all or any such tryals as shall be there had or passed, that justice may not be done in a corner nor in any covert manner, being intended and resolved, by the help of the Lord, and be these our Concessions and Fundamentals, that all and every person and persons inhabiting the said Province shall, as far as in us lies, be free from oppression and slavery.

5 THORPE, AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS, 1492-1908, at 3060.

This right of the people that the court of justice shall be public was included in the Bill of Rights of many states and territories. The most common phrase was: "That all courts shall be open."[10]

In 1789, the Congress enacted the Sixth and Ninth Amendments. In commenting on the argument raised by Alexander Hamilton and others, that a Bill of Rights was unnecessary or undesirable because the Federal Government was a government of delegated powers without authority in any event to intrude upon fundamental personal rights, Mr. Justice Story wrote:

> In regard ... [a] suggestion, that the affirmance of certain rights might disparage others, or might lead to argumentative implications in

[10] Constitutions of Alabama 1819, Sec. 14, 1 Thorpe, p. 97; Colorado 1876, Art. II, Sec. 6, *Id.* p. 475; Connecticut 1818, Art. I, Sec. 12, *Id.* at 538; Delaware 1792, Art. 1, Sec. II, *Id.* at 1058; Kansas 1855, Art. I, Sec. 16, *Id.* at 1181; Kentucky 1792, Art. XII, Sec. 13, 3 Thorpe at 1275; Nebraska 1867, Art. I, Sec. 9, 4 Thorpe at 2350; North Dakota 1889, Art. I, Sec. 22, 5 Thorpe at 2858; Ohio 1851, Art. I, Sec. 16, *Id.* at 2915; South Dakota 1889, Art. VI, Sec. 20, 6 Thorpe at 3371; Tennessee 1870, Art. I, Sec. 17, *Id.* at 3450, Wyoming 1899, Art. I, Sec. 8, 7 Thorpe at 4418.

> favor of other powers, it might be sufficient to say that such a course of reasoning could never be sustained upon any solid basis.... But a conclusive answer is, that such an attempt may be interdicted (as it has been) by a positive declaration in such a bill of rights that the enumeration of certain rights shall not be construed to deny or disparage others retained by the people.

II STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1867 at 626-627 (5th ed. 1891).

In *Gannett v. DePasquale, supra,* this Court was not presented with, and therefore did not address, the argument that an immemorial right to attend judicial proceedings is reserved to the people under the Ninth Amendment. Justice Stewart based his decision upon analysis of the Sixth Amendment.[11] He interpreted the failure of the Congress to explicitly prescribe in the Sixth Amendment an independent public right of open proceedings as a decision to elevate the defendant's right to protection from a biased jury over and above the public's protection from secret proceedings. Yet, we respectfully submit that Justice Blackmun is correct in saying, "there is no indication that the First Congress in proposing what became the Sixth Amendment meant to depart from the common law practice" of open proceedings. *Gannett v. DePasquale, supra* at 651 (Blackmun, J., dissenting opinion). Although the historical debate between Justice Stewart (see 61 L.Ed.2d at 624-28) and Justice Blackmun (61 L.Ed.2d at 646-55) points up the fact that history

[11] Justice Stewart declined to decide whether members of the press and public have a right of access to judicial pretrial proceedings under the First and Fourteenth Amendments because "even assuming *arguendo* that the First and Fourteenth Amendments may guarantee such access ... this putative right was given all appropriate deference by the state *nisi prius* court in the present case." 61 L.Ed.2d at 629.

unfortunately sheds little clear light on the specific intention of the authors of the public trial guarantee, see generally F. HELLER, THE SIXTH AMENDMENT TO THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT (1951), your amici respectfully submit that the public trial provision of the Sixth Amendment was not intended to protect defendants from press comment. Rather, it was intended to protect defendants and the public from abuse of judicial authority. See *In Re Oliver*, 333 U.S. 257, 268, 270-273 (1948) ("Contemporaneous review of criminal trials in the forum of public opinion constitutes an effective restraint on possible abuse of judicial process." *Id.* at 270); T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWERS OF THE STATES OF THE AMERICAN UNION, 647 (8th ed. 1977).

Another clause of the Sixth Amendment guarantees an accused a trial before an impartial jury. And there is no historical evidence to suggest that the framers contemplated the opposite of a public trial, guaranteed in one part of the Sixth Amendment, as a legitimate means of securing an impartial jury, which is guaranteed in another.

In discussing the intent of Congress in enacting the public trial, as opposed to fair trial, guarantee, Justice Story noted:

> In declaring, that the accused shall enjoy the right to a speedy and public trial [the Sixth Amendment] does but follow out the established course of the common law in all trials for crimes. The trial is always public.

III STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 662 (1833).

Unlike some common law rules, such as the disqualification of witnesses because of interest, the requirement that judicial proceedings are public is not a mere

form whose justification has long since faded, a relic of a bygone era. Instead, as both the majority and dissent in *Gannett* recognized, public access to criminal proceedings is an integral and necessary part of a democratic government. Public belief in, and support of, the process of justice is crucial to a government that is based on the consent of the governed. The public's perception that justice is being done is especially important when the government through the criminal process denies a citizen liberty or even life itself.[12] But this is not the only value served by continuing to keep the courts open to the public. The courts are servants of the people, who are entitled to observe and evaluate the efficiency, comportment, and dedication of judges, prosecutors, and other attorneys.

This social interest in public trials is of overriding importance independent of, and qualitatively different from, other constitutionally protected interests. No one could doubt, for example, the enormous societal interest in the swift and fair administration of justice, *see Barker v. Wingo*, 407 U.S. 514, 519 (1972), or in having a criminal case heard by a jury, *see Patton v. United States*, 281 U.S. 276, 312 (1935). But the openness of criminal trials is a right which is more fundamental still, for its principal purpose is to ensure the maintenance of other specific rights such as the two listed above. It would thus be entirely consistent to recognize a Ninth Amendment right of access to trials and not recognize similar rights of

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[12] See 3 W. BLACKSTONE, COMMENTARIES 372; M. HALE, THE HISTORY OF THE COMMON LAW IN ENGLAND 344 (6th ed. 1820). These values were recognized by the Gannett majority, 61 L. Ed.2d at 623-24 as well as the dissent, which authoritatively canvassed the history. *Id.* 646-49. The majority and dissent differed only on the weight to be accorded these values in the context of a Sixth Amendment analysis. The resolution of the disagreement with respect to the Sixth Amendment in no way forecloses the distinct analysis suggested here in the context of the Ninth Amendment.

the public to compel a speedy trial or a trial by jury, beyond those set forth in the Fifth and Sixth Amendments themselves. A long-delayed bench trial, for example, though hardly desirable in any respect, may nonetheless be tolerable because the trial, when it does take place, *will* be open to the public so that all may judge whether the delays were supportable and the proceedings just. Yet one need only imagine the public response to, say, a criminal case repeatedly continued at the defendant's request then tried only to the court, in secret, and finally dismissed on an unexplained verdict of "not guilty," to realize the necessary preeminence of the right of public access to trials.

This Court has not hesitated to conclude that the dictates of history and the requisites of our democratic form of government require that certain constitutional rights be recognized, notwithstanding the fact that there is no explicit reference to them in the Constitution itself. That is precisely the path this Court takes when determining whether a certain right is so fundamental to the "Anglo-American regime of ordered liberty" that it is enforceable against the states under the due process clause of the Fourteenth Amendment. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145, 149-50 n.14 (1968). Indeed, this Court has frequently examined the interstices of the Constitution to find rights not specifically enumerated in the text. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), for example, the Court struck down a state statute that penalized the use by married couples of "any drug, medicinal article, or instrument for the purpose of preventing conception." The right of privacy relied upon by the Court was found nowhere in the express terms of the Constitution but was held to be of constitutional stature nevertheless. It emanates from the First, Third, Fourth, Fifth, and Ninth Amendments, each of which has "a penumbra where privacy is protected from governmental intrusion." *Id.* at 483. *Cf. id.* at 500 (Harlan, J., concurring) (right of privacy is "implicit in the concept of ordered liberty" protected by due process and need not be based in any specific guaranty of Bill of Rights).

Nor is this mode of analysis limited to protection of highly personal rights such as marital privacy. It has been accepted at least since *Embrey v. Palmer*, 107 U.S. 3 (1882), that state courts must respect the judgments of federal courts, although neither the full faith and credit clause of the Constitution, U.S. Const. art. IV, § 1, nor its implementing statute, Act of May 26, 1790, Ch. XI, 1 Stat. 122 (now codified at 28 U.S.C. § 1738 (1976)) may fairly be read to require such a result. Similarly, one may search Article II of the Constitution in vain for any mention of executive privilege, but there is now no question that the privilege exists:

> [T]he privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.

United States v. Nixon, 418 U.S. 683, 705-06 (1974) (footnote omitted).

In none of these cases did the Court find rights in specific constitutional text: in each instance, it explored the limits of governmental authority inherent in the political structure established by the Framers. We ask no more.

These cases demonstrate, as well, that the Ninth Amendment analysis need not and should not be a license for judicial freewheeling reminiscent of *Lochner-era* substantive due process. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 527-28 (1967) (Stewart J., dissenting). Rather, it is a vehicle for preserving those values—and

only those values—that have been a part of the structure of our society since well before our nation's independence. The citizen's right to attend court and see justice done has been an attribute of Anglo-American law for over a thousand years. The failure to refer specifically to that right in the First or Sixth Amendment cannot be held to deny the right the constitutional stature it deserves. Surely nothing in the First or Sixth Amendment requires such a result; the Ninth Amendment and centuries of our jurisprudence forbid it.

III

THE CONSTITUTIONAL RIGHTS OF THE PUBLIC TO ATTEND JUDICIAL PROCEEDINGS CANNOT BE DENIED ABSENT A CLEAR AND PRESENT DANGER TO A DEFENDANT'S RIGHT TO A FAIR TRIAL AND A CLEAR SHOWING THAT LESS INTRUSIVE MEASURES WILL BE INEFFECTIVE IN PROTECTING THE DEFENDANT'S RIGHTS

The fundamental question which this Court must address is whether the First, Sixth and Ninth Amendments to the Constitution guarantee to the public a right of access to criminal trials. Because of the fundamental character of the rights asserted and their constitutional foundations, this Court should impose the highest standard of judicial protection for such rights. Nothing less than a showing of clear and present danger to a constitutional right of equal stature, a defendant's right to a fair trial, must be required prior to closing a criminal trial.

In *Gannett v. DePasquale, supra*, this Court clearly delineated cases involving access to criminal proceedings from cases wherein prior restraints on publication are

imposed. Recognizing this distinction, your amici respectfully submit that the immemorial right of the people to attend criminal trials deserves the same judicial protection as the right of the press to publish accurate information lawfully obtained.

The American Bar Association Task Force on Fair Trial and Free Press chaired by Judge Alfred T. Goodwin of the Ninth Circuit Court of Appeals, after eleven years of intensive study, has adopted, and the ABA House of Delegates has approved, the standards set forth in *Nebraska Press Ass'n. v. Stuart, supra*, with regard to closure of pretrial proceedings. See Appendix A (full text). Standard 8-3.2 states that closure may be ordered only if:

> (1) dissemination of information from the pretrial proceeding and its record would create a clear and present danger to the fairness of the trial, and,
>
> (2) the prejudicial effect of such information upon trial fairness cannot be avoided by any reasonable alternative means.

The *Commentary* on this Standard suggests the following specific alternatives: "(1) continuance, (2) severance, (3) change of venue, (4) change of venire, (5) intensive voir dire, (6) additional peremptory challenges, (7) sequestration of the jury, and (8) admonitory instructions to the jury."

In addition to the American Bar Association provisions cited above, your amici respectfully urge this Court to adopt a rule that would forbid closure of a criminal proceeding in the absence of an assessment of the probable efficacy of the action. In *Nebraska Press Ass'n. v. Stuart, supra*, Chief Justice Burger, writing for the majority, required such an assessment of the Court's order "as a workable method of protecting the defendant's right

to a fair trial prior to the setting aside of First Amendment rights." *Id.* at 565. In rejecting the efficacy of the gag order, Chief Justice Burger recognized the dangers inherent in the transmission of rumors where accurate reports of criminal trials are not available to the public:

> [G]iven the generative propensities of rumors; they could well be more damaging than reasonably accurate news accounts.

Id. at 567. Secret trials clearly give rise to a much greater degree of speculation. Under a gag order, such as the one in *Nebraska Press*, accurate oral reports may be disseminated by those in attendance. Under a closure order where only the parties are present, totally unfounded speculation concerning a conviction or acquittal is inevitable.

The importance of assessing the efficacy of any state action which inhibits a constitutional right was affirmed as recently as the last term of this Court in *Smith v. Daily Mail Publishing Co.*, ____U.S.____, 61 L.Ed.2d 399 (1979).

Justice Rhenquist addressed this issue in his concurring opinion:

> I believe that an obvious failure of a state statute to achieve its purpose is entitled to considerable weight in the balancing process that is employed in deciding issues arising under the First and Fourteenth Amendment protections accorded freedom of expression.

Id. at 409 n. 3.

Your amici respectfully urge this Court to clarify this area of the law by adopting the standards set forth in *Nebraska Press Ass'n. v. Stuart*, *supra*.

The majority opinion of this Court in *DePasquale*, while acknowledging that a defendant has no absolute right to compel a private trial, does not prescribe adequate standards against which, in the context of potentially

prejudicial pretrial publicity, a defendant's motion for closure must be weighed. Justice Stewart has correctly observed in *DePasquale*, that, with the possible exception of the right to assistance of counsel,[13] Sixth Amendment guarantees do not as a matter of law, confer on a criminal defendant the right to demand their opposites. 61 L.Ed.2d at 623. *See also, Singer v. United States*, 380 U.S. 24 (1965) (right to jury trial); *Barker v. Wingo*, 407 U.S. 514 (1972) (right to speedy trial). This principle is buttressed by the fact that, regardless of whether the public's right to attend judicial proceedings is of constitutional magnitude, "there is a strong society interest in public trials." *Gannett v. DePasquale*, *supra* at 623. Courts do not have unrestricted power to "suppress, edit, or censor events or publication thereon which transpire in proceedings before it." *Craig v. Harney*, 331 U.S. 367 (1947).

> The law . . . favors publicity in legal proceedings so far as that object can be attained without injustice to the persons immediately concerned.

2 COOLEY, CONSTITUTIONAL LIMITATIONS 931-932 (Covington ed. 1927)

In holding that the television media do not have the right to overcrowd a courtroom with reporters, lighting and camera equipment so as to deny in a pretrial hearing the "judicial serenity and calm to which [a defendant is] entitled," *Estes v. Texas*, 381 U.S. 532 (1965), this Court observed:

> It is true that the public has the right to be informed as to what occurs in its courts, but reporters of all media, including television, are always present if they wish to be . . .

Id. at 541.

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[13] See Faretta v. California 422 U.S. 806 (1975)

Thus, it becomes the defendant's burden to justify closure of presumptively open proceedings. See, *e.g.*, *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539 at 562, 569, 571; *Nebraska Press Ass'n. v. Stuart*, 423 U.S. 1327, 1333 (1975) (Blackmun, Circuit Justice, mem.). This burden requires the defendant to establish a causal relationship between the exercise of the right to attend open proceedings, and the substantive evil which the government is empowered to regulate (the unfair trial). This burden is necessarily heavy because, in the first place, "in the overwhelming majority of criminal trials, pretrial publicity presents few unmanageable threats to this important [Sixth Amendment] right." *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539 at 551.

Of course, it cannot be denied that extremely inflammatory and prejudicial publicity may create "tensions ... between the right of the accused to trial by an impartial jury and the rights guaranteed others by the First Amendment." *Id.* Yet, "cases such as these are relatively rare, and we have held that trials have been fair in spite of widespread publicity." *Id.* at 554.

The reason why "pretrial publicity—even pervasive, adverse publicity—does not [necessarily] lead to an unfair trial" is that "the capacity of the jury eventually impaneled to decide the case fairly is influenced by the tone and extent of the publicity ..." *Nebraska Press Ass'n. v. Stuart*, *supra* at 554-55; see also, *Murphy v. Florida*, 421 U.S. 794 (1975).

Requiring that a defendant present some factual justification for conducting judicial proceedings in secret is made difficult, yet all the more appropriate, because any determination that conducting a trial or pretrial hearing in public will ultimately deny a defendant a trial before an impartial jury is "of necessity speculative, dealing...with factors unknown and unknowable." *Nebraska Press Ass'n.*

supra, at 563. *Accord*, *id.* at 599, 604 (Brennan, J., concurring). The court must speculate about the amount and nature of the evidence which will be publicly disclosed and its impact upon the veniremen. Lastly, the judge must consider whether the information suppressed through closure might leak out in any event, or perhaps "become available through rumors and gossip, whether or not the press is enjoined from [attending the proceeding]." *Nebraska Press Ass'n.*, *supra*, at 599, n. 22 (Brennan, J., concurring opinion).[14]

More importantly, the burden of establishing the need for closure must remain heavy because there are measures available to a trial court which can protect against impartial juror prejudice in ways much less damaging to the First Amendment and other societal policies served through public proceedings. "[M]embers of the press and public objecting to the exclusion have the right to demand that it extend no further than is likely to achieve these goals." *Gannett v. DePasquale*, *supra*, at 634 (Powell, J., concurring opinion).[15] This principle is in accord with the holdings in previous cases that First Amendment freedoms cannot be subordinated by one means, where alternative means less restrictive of First Amendment liberties, yet effective, are available. *See e.g.*, *Nebraska Press Ass'n. v. Stuart*, *supra*, at 562-565; *Gooding v. Wilson*, 405 U.S. 518, 522 (1973); *Carrol v. President and Commissioners of Princess Anne*, 393 U.S. 175, 183 (1968);

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[14] "Indeed, the media in such situations could help dispel erroneous conceptions circulating among the populace." *Id.* at 599 fn.22 (Brennan, J., concurring opinion).

[15] "There can be no ducking of the problem of the press prejudging trials even if the occurrence is seldom and is almost solely confined to *causes celebres*. But the solutions that we seek must be appropriate to the difficulties, both to their nature and to their frequency. The question is not a matter of neglecting to find a remedy but to find one no more painful than the illness demands." A. FRIENDLY AND R. GOLDFARB, CRIME AND PUBLICITY, 71 (1967)

Cantwell v. Connecticut, 310 U.S. 296, 204 (1904); *Scott v. Scott*, (1913) A.C. 417, 438 (Vicount Haldane L.C.). (Before the Courts of England may be closed, those who would close them "must satisfy the Court that by nothing short of the exclusion of the public can justice be done.")

Your amici urge this Court to adopt the rule which the Constitution requires that a criminal proceeding may be closed to the public only where:

> (1) there is a strong showing that prejudicial publicity will create a clear and present danger to the fairness of the trial;
>
> (2) the prejudicial effect of such information cannot be avoided by alternative means; and
>
> (3) a strong showing is made that closure will accomplish its purpose of preventing jury prejudice.

CONCLUSION

It would indeed be a sad day in the history of our country's jurisprudence if the Commonwealth of Virginia, the birthplace of the Bill of Rights, should cause the loss of an immemorial right to open criminal proceedings in our society. Such open proceedings are, without doubt, an intregal part of the system of civil liberties envisioned by George Wythe, Patrick Henry, Thomas Jefferson, James Madison and other great patriots. We most respectfully urge that the Supreme Court of Virginia be found in error and that this Court reconsider its ruling in *DePasquale* so that, once and for all, no one will question the fact that open judicial proceedings must be maintained in a participatory government such as ours. Only in the most egregious circumstances should any judicial proceeding be closed to the public and under our republican form of democracy to the public's representative, the press.

Your amici appreciate this opportunity to have presented these views to this distinguished body and we await with great interest the resolution of these vital questions.

Respectfully submitted,

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APPENDIX A

AMERICAN BAR ASSOCIATION STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE

Standard 8-3.2. Pretrial proceedings: exclusion of public and sealing of records

Except as provided below, pretrial proceedings and their record shall be open to the public, including representatives of the news media. If at the pretrial proceeding testimony or evidence is adduced that is likely to threaten the fairness of a trial, the presiding officer shall advise those present of the danger and shall seek the voluntary cooperation of the news media in delaying dissemination of potentially prejudicial information by means of public communication until the inpaneling of the jury or until an earlier time consistent with the fair administration of justice. The presiding officer may close a preliminary hearing, bail hearing, or any other pretrial proceeding, including a motion to suppress, and may seal the record only if:

(i) the dissemination of information from the pretrial proceeding and its record would create a clear and present danger to the fairness of the trial, and

(ii) the prejudicial effect of such information on trial fairness cannot be avoided by any reasonable alternative means.

The defendant may move that all or part of the proceeding be closed to the public (including representatives of the news media), or, with the consent of the defendant, the presiding officer may take such action sua sponte or at the suggestion of the prosecution. Whenever under this rule all or part of any pretrial proceeding is held in chambers or otherwise closed to the public, a

complete record shall be kept and made available to the public following the completion of trial or earlier if consistent with trial fairness.

History of Standard

This is original standard 3.1. Several changes have been made; some are organizational or for clarification, while others are substantive. First, the standard governs both the closing of pretrial proceedings and the sealing of court records. Second, the standard establishes a clear-cut presumption in favor of the openness of pretrial proceedings and court records. As an alternative to either procedure, the standard encourages the development of voluntary agreements between the press and the courts concerning the publication of information which might affect the defendant's right to a fair trial. Finally, if a motion is made for closure of a pretrial proceeding or the sealing of court records, a two-part standard applies that combines the clear and present danger and least restrictive alternative tests. This standard is more rigorous than the test in original standard 3.1, which was based on the "substantial likelihood of interference" formulation.

Related Standards

None

Commentary

The policy underlying this standard is a strong presumption in favor of open judicial proceedings and free access to records in a criminal case. Although this standard deals only with pretrial proceedings, the general principle extends to every phase of judicial proceedings in a criminal case.

The sixth amendment speaks in terms of the right of the accused to a public trial,[1] but this right does not belong solely to the accused to assert or forgo as he or she desires.[2] Many courts have recognized that the public generally has an overlapping and compelling interest in public trials.[3] The defendant's interest, primarily, is to ensure fair treatment in his or her particular case. While the public's more generalized interest in open trials includes a concern for justice to individual defendants, it goes beyond that. The transcendent reason for public trials is to ensure efficiency, competence, and integrity in the overall operation of the judicial system.[4] Thus, the defendant's willingness to waive the right to a public trial in a criminal

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[1] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." U.S. CONST. amend. VI *See In re Oliver*, 333 U.S. 257 (1948). The Supreme Court has also held that due process "demands appropriate regard for the requirements of a public proceeding in . . . all adjudications through the exercise of the judicial power." Levine v. United States, 362 U.S. 610, 616 (1962).

Although there is authority holding that preliminary proceedings are not within the meaning of the sixth amendment, Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756 (1977), the great majority of courts have rejected that view. *See, e.g.*, United States v. Clark, 475 F.2d 240 (2d Cir. 1973); Bennett v. Rundle, 419 F.2d 599 (3d Cir. 1969) (en banc).

[2] United States v. Cianfroni, F.2d, 3 Med. L. Rptr. 1961, 1970-72 (March 16, 1978); United States v. Kobli, 172 F.2d 919, 924 (3d Cir. 1949) (en banc); United States v. Lopez, 328 F.Supp. 1077, 1087 (E.D.N.Y. 1971); Commercial Printing Co. v. Lee, 553 S.W.2d 270 (Ark. 1977); Keene Publishing Co. v. Keene Dist. Court, 380 A.2d 261 (N.H. 1977); People v. Marino, 383 N.Y.S.2d 147 (Cty. Ct. 1976). *See also* Singer v. United States, 380 U.S. 24 (1965).

[3] *See* cases cited in note 2 *supra*.

[4] These themes are emphasized to varying degrees in all of the cases cited in note 2 *supra*. The theme of judicial integrity, however, has been a paramount concern to the Supreme Court, and the role of the press in promoting that value has been

(footnote continued on next page)

case cannot be the deciding factor. This holds true no matter how personally beneficial private proceedings in a criminal case might be to the defendant. It is just as important to the public to guard against undue harshness or discrimination.[5]

The role of the news media in this process is especially significant. Few individuals have the time or inclination to observe personally the operation of the criminal justice system. Representatives of the news media largely serve that function. It has been argued that the press has a first amendment right of access to the courts and court records that exceeds such rights of members of the public generally. This view has been rejected by the courts.[6]

The policy in this standard in favor of open proceedings and free access to court records rests on sixth amendment grounds. It is subject to important limitations. When there is a threat to the defendant's right to a fair trial, the trial judge is obligated to take steps to neutralize that threat. The first step in the process should be to seek a voluntary agreement with members of the news media about the timing and scope of coverage. It is undesirable to resolve such questions by litigation without first considering informal and less antagonistic measures. The use of voluntary fair trial/free press agreement is already a practice in many jurisdictions, and the trend should be

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consistently recognized. Landmark Communications, Inc. v. Virginia, 46 U.S.L.W. 4389, 4392-93 (May 1, 1978); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559-60, 606 (1976); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-96 (1975); Sheppard v. Maxwell, 384 U.S. 333, 350 (1966); *In re* Oliver, 333 U.S. 257, 270-71 (1948).

[5] *In re* Edens, 226 S.E.2d (N.C. 1976).

[6] Pell v. Procunier, 417 U.S. 817 834-35 (1974); Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974); United States v. Gurney, 558 F.2d 1202, 1208-09 (5th Cir. 1977); Garrett v. Estelle, 556 F.2d 1274, 1277-78 (5th Cir. 1977).

encouraged.[7] In any event, if a voluntary agreement is reached between representatives of the news media and the court, any delay in the publication of potentially prejudicial information should be only until the impaneling of the jury, and shorter if possible.

The principles embodied in standard 8-3.2 represent a significant departure from original standard 3.1. The substance of the standard, however, is the option of closing pretrial proceedings and sealing judicial records. Before pretrial proceedings can be closed or any record sealed, the two-part test of the standard must be met. The moving party must establish that: (1) a clear and present danger to the fairness of the trial would exist if the information were publicly disclosed, and (2) the prejudicial effect of such information on the fairness of the trial cannot be avoided by reasonable alternative means. The standard does not enumerate possible procedural alternatives, but the effectiveness of the following should receive serious consideration: (1) continuance, (2) severance, (3) change of venue, (4) change of venire, (5) intensive voir dire, (6) additional peremptory challenges, (7) sequestration of the jury, and (8) admonitory instructions to the jury.[8]

The public interest in open proceedings and free access to courts in a criminal case is at least as strong as the first amendment policy against prior restraints. Consequently, this standard follows the basic approach taken

[7] As of June 1974, twenty-three states adopted voluntary fair trial/free press guidelines. ABA, FAIR TRIAL/FREE PRESS VOLUNTARY AGREEMENTS (1974).

[8] The Supreme Court noted several of these measures in Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562-65 (1976). Others are enumerated in a report to the Senate Subcommittee on Constitutional Rights. STAFF OF SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, FREE PRESS-FAIR TRIAL, 94th Cong., 2d Sess. 8-10 (1976).

by the Supreme Court in *Nebraska Press Association v. Stuart*.[9] Although developed in the context of a prior restraint case, that approach or its equivalent has been applied in the present context by a number of courts.[10] The question might legitimately be raised, however, why the *Nebraska Press Association* test is adopted in this standard but rejected in standard 8-3.1. The answer lies in the fact that there is a crucial difference between imposing prior restraints against the press on the one hand and the denial of access to news sources on the other. The administration of a system of prior restraints necessarily involves the courts in overseeing the press; the entanglement of the courts and the press results in unavoidable and perhaps unintended suppression of first amendment values no matter how carefully or conscientiously a court may draw the line between protected and unprotected speech.[11] There is less difficulty where closure of judicial proceedings and sealing of court records are at issue. Hence, case-by-case adjudication is acceptable under this standard, but not under standard 8-3.1.

The last paragraph in standard 8-3.2 requires that any motion to close a pretrial proceeding or seal court records be made with the consent of the defendant. The motion, however, cannot be granted unless the court affirmatively concludes that the requirements of the clear and present danger and least restrictive alternative tests have been met. The burden of proof is on the party making the motion. The standard thus clarifies the language of original standard 3.1 stating that the motion to

[9] 427 U.S. 539, 562-65 (1976).

[10] *See e.g.*, United States v. Cianfroni, F.2d, 3 Med. L. Rptr. 1961 (March 16, 1978); Keene Publishing Corp. v. Keene Dist. Court, 380 A.2d 261 (N.H. 1977); State v. Allen, 73 N.J. 132, 373 A.2d 377 (1977).

[11] T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 506 (1970). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 724-31 (1978).

close a pretrial hearing "shall be granted unless the presiding officer determines that there is no substantial likelihood"[12] of interference with the defendant's right to a fair trial by an impartial jury.

The last sentence in standard 8-3.2 provides that when a procedure is held in chambers or otherwise closed to the public, a complete transcript shall be kept and made available after the conclusion of the trial or disposition without trial. The purpose of this requirement is to provide a surrogate method of examining the conduct of closed proceedings. The transcript is the only possible substitute for the denial of access.

[12] ABA, FAIR TRIAL AND FREE PRESS 113 (1968).